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IN THE

Supreme Court of the United States

October Term 1970

No. ~~1857~~ 70-312

THOMAS FITCH GOODMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THOMAS FITCH GOODMAN, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Thomas F. Goodman, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered March 16, 1971.

Opinions Below.

The District Court did not render an Opinion or written findings. The Opinion of the Court of Appeals is not yet reported; it is set forth in the Appendix to this Petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 16, 1971. Petition for a rehearing was denied on April 23, 1971. Petitioner applied to Mr. Justice Douglas for an extension of time in which to file petition for Writ of Certiorari, which extension was granted to and including June 22, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

Questions Presented.

1. Does the prosecution, under 50 U.S.C. Appendix §462(a), for violation of the Military Selective Service Act of 1967, require as an element, proof of specific intent?

2. Does the phrase, "knowingly" as used in 50 U.S.C. Appendix §462(a), require the prosecution to prove beyond a reasonable doubt the defendant knew that a defendant charged with a violation of the Military Selective Service Act of 1967, knew he had an absolute legal duty to submit to induction, and that by failing to submit to induction, the defendant thus knew he was violating the law and "knowingly refused"?

3. Is mistake either of fact or of law, a defense to prosecution for violation of the Military Selective Service Act of 1967? If so, does due process of law require the Court to allow the admission of all relevant evidence of lack of specific intent, including corrobative evidence?

4. In the prosecution for violation of the Military Selective Service Act of 1967, may the trial court instruct that "as a matter of law, the classification of the defendant is correct", rather than "there is a basis in fact for the classification"?

5. May the Court, in the prosecution for violation of the Military Selective Service Act of 1967, instruct the jury, "There is no law which excuses failure to report for induction, when ordered", without violating the constitution of the United States?

6. May a Motion for Judgment of Acquittal, made at the close of the prosecution's case, be reserved?

7. In the prosecution for violation of the Military Selective Service Act of 1967, when the registrant's

Selective Service File does not contain evidence of specific intent, may the Government merely submit the Selective Service file and rest, or does this procedure fail to establish a *prima facia* case and shift the burden of proof in violation of procedural due process?

Constitutional, Statutory and Regulatory Provisions Involved.

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ."

Military Selective Service Act of 1967, §12(a); 50 U.S.C. App. §462(a):

> . . . [A]ny person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules, regulations or directions made pursuant to this title, . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or both such fine and imprisonment. . . .
>
> Whenever a registrant who is in class 1-A claims that he has one or more of the disqualifying medical conditions or physical defects which appear in the list described in §1629.1 the local board shall order him to present himself for interview

with medical advisor to the local board at the time and place specified by the local board by mailing to such registrant a notice to appear for medical interview (SSS Form 219).

Code of Federal Regulations, §1628.2(b). The Surgeon General of the Department of the Army shall, from time to time, prescribe or approve a list of enumerating various medical conditions or physical defects that disqualify registrants for service in the Armed Forces. A medical review of certain registrants by the medical advisor to the local board shall be accomplished for the purpose of screening and disqualifying at the local board those registrants who have the conditions or defects enumerated on the list.

Section 1628.1 Code of Federal Regulations. Pursuant to Section 1628.1, the Department of the Army has promulgated Army Regulation AR 40-501. Section 5 of said Article, entitled, Ears and Hearing, provides, in part, "the causes for rejection for appointment, enlistment and induction are . . . presence of attic perforation in which the presence of cholesteatoma is suspected and acute or chronic serous ostitis media; repeated attacks of catarrhal ostitis media." The President is authorized, under such Rules and Regulations, as he may prescribe to provide for the deferment from training and service in the Armed Forces, of any or all of those categories of persons found to be physically deficient or defective.

Statement of the Case.

This is an Appeal from the denial of the Judgment of Acquittal and from a Judgment of Conviction and sentence of three years imprisonment for violation of 50 U.S.C. App. 462; Military Selective Service Act of 1967; (Failure to report for induction), entered December 9, 1969.

The Petitioner, Thomas F. Goodman, was born August 3, 1942. The Petitioner registered with the local board No. 135 on August 5, 1960 (Selective Service file, p. 1). Petitioner did not have a disabling physical condition at the time he completed his classification questionnaire which was received by the local board October 9, 1963 (Selective Service file, p. 8).

In Summer, 1967, the Petitioner developed the following medical symptoms: Drainage from the ear, headaches, nausea, ringing of ears, dizziness. These conditions appeared periodically, extended for a period of two to three days at a time, and continued until Summer, 1968 [Trans. pp. 167, 168]. Petitioner received medical treatment and medication during this period from Dr. Mark Maxwell, a duly licensed physician specializing in internal medicine, now deceased. He was, however, never told the exact name of the condition from which he was suffering [Trans. p. 168]. During the third week of July, 1968, the Petitioner moved from his parents home to the Pixie Motel in Anaheim, while he was searching for his own apartment. He did not notify the draft board of his change of address although he intended to notify the draft board when he obtained a permanent address [Trans. pp. 169, 170]. The Petitioner's parents were vacationing in Iowa from July 20, to August 7, 1968 [Trans.

p. 169]. On August 5th, the Petitioner had another attack of the symptoms hereinabove described and on August 6th, visited the offices of Dr. Mark Maxwell, for examination and treatment [Trans. p. 170]. The Petitioner's parents returned to their home on August 7, 1968, and the following morning called Petitioner and advised him that they were in receipt of a letter from the draft board. Petitioner went to their home and picked up the letter. Upon opening it, he found it was a notice to report for induction on the 13th of August, 1968, the notice having been dated July 29, 1968 [Trans. pp. 170, 171]. Petitioner thereupon became concerned about this medical condition and contacted Dr. Maxwell. On that date, August 8, 1968, the Petitioner first learned that he was suffering from Recurrent Otitis Media Bilateral and possible Cholesteatoma [Trans. p. 171]. That evening he researched Army Regulation 40-501, as well as C.F.R. Section 1625 and C.F.R. Section 1628. The following day, the 9th of August, he obtained a medical report from Dr. Maxwell and forwarded this report to his draft board together with a letter advising the board of his research and his physical disability and requesting a 4-F Classification (Selective Service file, pp. 81, 82). Because a weekend intervened, the letter was not received until August 12, 1968. Petitioner's induction date was set for August 13, 1968, on which date the Petitioner was 26 years and 10 days old. On a prior occasion the local board had postponed Petitioner's induction one day prior to the induction date [Selective Service file p. 74, Trans. p. 196]. (It is interesting to note that the local board erred by merely postponing Petitioner's induction date, rather than by reclassifying him as the Regulations require. Had Petitioner been reclassified,

the instant problem never would have arisen for the board would have been required to change Petitioner's classification back to 1-A rather than to merely send a new induction order). The Petitioner received no communication from the draft board on either August 12 or August 13. Both of those days, he was engaged in trial in Orange County Superior Court representing a client charged with a felony [Trans. p. 198].

Because the Petitioner had received no reply to his letter of August 9, 1968, on October 7, 1968, he addressed another registered letter to Local Board No. 135, advising that as of said date he had received no reply to his letter of August 9, 1968, nor had he received Selective Service Form 219, pursuant to Section 1628.2(b) of the Code of Federal Regulations. Petitioner further advised the local board in this letter that it was not his wish to obtain a delinquent classification and, therefore, he requested that the local board review his file and advise at the earliest possible opportunity [Trans. p. 8].

In late December, 1968, the Petitioner, had still received no communication whatsoever from the local board. He was, however, then contacted by representatives of the Federal Bureau of Investigation who advised him that the file had been turned over to the United States Attorney's Office, Criminal Division, for which office they were conducting an investigation. Petitioner reviewed the entire matter with the F.B.I. representatives and indicated that it was his position that Section 1628.2(b) of the C.F.R. was mandatory based on the facts submitted to the board and that the failure of the board to comply with the requirements of said section rendered the induction order void [Trans. p. 6].

Petitioner further discussed the file by telephone with a deputy of the United States Attorney's Office in January, 1969. At that time, he again reviewed the entire matter and was advised by the United States Attorney's Office that under no circumstances would a medical interview, pursuant to Section 1628.2(b), be granted and that a new induction hearing would be set, and that if Petitioner did not report for induction, a criminal indictment would be filed. In that conversation, Petitioner pointed out to the deputy that under the law, as it existed at that time, there was no way to bring a civil action to compel the Selective Service to comply with its own regulations and, that the matter could be raised only as a defense to a criminal prosecution [Trans. p. 8]. On January 23, 1969, still having received no response, either affirmatively or negatively from the local board with respect to his request for a medical interview, the Petitioner addressed another letter to the local board and to the United States Attorney's Office, reviewing the entire matter and advising that he had no wish to be delinquent or to violate any federal law [Trans. p. 7].

On April 2, 1969, indictment was filed and an order for arrest issued. On May 5, 1969, the Petitioner appeared and plead not guilty to the crime charged. The case was ordered assigned to the Honorable Francis C. Whelan, or further proceedings. On May 22, 1969, Petitioner filed a Notice of Motion to Dismiss and, on June 23, 1969, July 7, 1969, and July 11, 1969, hearings were held on the Motion to Dismiss. On July 11, 1969, the Motion was denied with leave to renew it at time of trial as a Motion for Acquittal. On October 9, 10, and 13, 1969, a jury trial was held before the Honorable Francis C. Whelan, Judge presiding [Trans. pp. 75, 76].

At the trial, the Court refused to allow the jury to be shown or quoted the regulation in question, C.F.R. 1628.2(b) [Trans. p. 86]. Not only was the medical testimony of Petitioner's current treating physician refused admission [Trans. p. 66], but the Court also warned Petitioner not to go into detail regarding his medical condition [Trans. p. 167]. Later the Court, on its own motion, changed the prosecution's proposed instruction No. 3 from, "As a matter of law, there was a basis in fact for a 1-A Classification given to Defendant", to "The Court has determined that as a matter of law, the 1-A Classification given to the Defendant is correct." [Trans. pp. 5, 105, 106].

During the trial, pursuant to the prosecution's request, the Court, at first, refused to allow the entire Selective Service File into evidence, but, instead, permitted the prosecution only to excerpt certain pages from the file and introduce these into evidence. Thereafter, the prosecution rested and the defense made a Motion for Judgment of Acquittal. The Court reserved the ruling on this Motion [Trans. p. 50]. Because the clerk's office lost the excerpts from the Selective Service File previously introduced by the prosecution, the Court permitted the prosecution to reopen its case to add these excerpts. At this time, the prosecution submitted the entire file, and the Court accepted the entire file into evidence before the jury [Trans. p. 157], but refused to allow the defense to comment upon or argue the affect of any entries occurring subsequent to the date upon which Petitioner was scheduled to report for induction [Trans. pp. 155, 163]. The defense objected vigorously on the grounds that it should be allowed to argue the evidence [Trans. p. 163]. Thereafter, on the following day, after both prosecution and

defense had rested and argued, the Court, on its own motion, permitted the defense to reopen its argument for three minutes to comment on the entries occurring subsequent to August 13, 1968, in the Selective Service File and specifically, the letters written to the local board by the Petitioner. The prosecution was also allowed to comment and then jury instructions were given and the cause submitted to the jury.

Thirty-five minutes later, the jury returned and asked to be allowed to see the specific language of Code of Federal Regulations, Section 1628.2(b). With this request, the Petitioner concurred [Trans. pp. 247-250]. The Court refused this request and, on its own motion, without request from either the prosecution or defense, or the jury, gave the following additional instruction:

> "There is no law which excuses failure to report for induction when ordered." [Trans. p. 252].

Thereafter, the jury resumed deliberations and returned, but seven minutes later, with a verdict of guilty. The Court imposed a sentence of three years imprisonment. Petitioner was released on $500.00 surety bond pending the outcome of an appeal to the Ninth Circuit. Petitioner is presently at liberty by virtue of a stay of execution ordered by Justice Douglas on May 26, 1971.

Soon after the judgment of the Court of Appeals, Petitioner timely moved for a rehearing before the Ninth Circuit, which rehearing was denied on April 23, 1971.

REASONS FOR GRANTING THE WRIT.

Introduction.

It is submitted the issues presented in this case comply with all four of the guidelines for the granting of a Writ of Certiorari set out by Rule 19 of the Rules of the United States Supreme Court, in that: (a) The Ninth Circuit has rendered a decision in conflict with the decisions of several other Circuits; (b) The Ninth Circuit has decided a Federal question in a way in conflict with the applicable decisions of the United States Supreme Court; (c) The Ninth Circuit has decided an important question of Federal Law which has not been, but should be, settled by the United States Supreme Court; (d) The Ninth Circuit has so far sanctioned a departure from the usual course of judicial proceedings as to call for the exercise of the United States Supreme Court's power of supervision.

The Specific Intent Question.

This Honorable Court has not yet decided whether specific intent is an essential element in the prosecution for violation of the Military Selective Service Act of 1967. (50 U.S.C. App. §462(a)). Until recently, it has not been necessary to do so, for the lower Federal Courts have been adhering to the elementary principle established in such cases as *United States v. Murdock*, 290 U.S. 389 (1933), which point out that Congress intends to impose criminal sanctions only for intentional evasions and not for mistakes or misunderstandings. As a result, virtually all Circuits have held specific intent to be an element in the crime of violating 50 U.S.C. App. §462 (a). See for example, *United States v. Hoffman*, 137 F. 2d 416 (2d Cir.), *Silver-*

man v. United States, 220 F. 2d 36 (8th Cir.), *Whitney v. United States,* 328 F. 2d 888 (5th Cir.), *Graves v. United States,* 352 F. 2d 878 (9th Cir.), *United States v. Ebey,* 424 F. 2d 376 (10th Cir.).

Recently, however, the District Courts have begun to express their dissatisfaction with the large array of Selective Service Cases confronting them by the device of paying lip service to the specific intent requirement while, at the same time, adopting procedures and interpretations which cut the heart from the doctrine, the classic case of the right hand which giveth, while the left hand taketh away.

Most of the procedures and interpretations currently in use, are present in the instant case as follows:

I.

Interpretation of the Word "Knowingly" to require a General Intent, Rather Than a Specific Intent.

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. Appendix §462(a) establishes the element of "knowingly" as the *mens rea* requirement. The *mens rea* requirement in the crime charged dictates a showing of specific intent before a conviction may be obtained. This court, in the case of *Morissette v. United States,* 342 U.S. 246 (1952) indicated the proper province of the jury in passing upon "knowing" or "wrongful" intent. In that case, the defendant was convicted of "knowingly converting" government property. Mr. Justice Jackson stated, in part, as follows:

> The Court thought that the only question was, "did he intend to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not

> an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. *Whether that intent existed, jury must determine, not only from the act of taking, but from that together with defense testimony and all the surrounding circumstances.*
>
> . . .
>
> Had the jury convicted on proper instructions, it would be the end of the matter. But juries are not bound by what seems to be inescapable logic to Judges. *342 U.S. at 275-76.*
>
> Had the statute applied to conversion without qualification, it would have made crime of all unwitting, inadvertent and unintending conversions. Knowledge, of course, is not identical with intent and may not have been the most apt word of limitation, but knowing conversion requires more than knowledge that the defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or intent, would not seem to alter its bearing on guilt. *Id.* at 270-71 (emphasis supplied).

Thus it can be drawn from the *Morissette* case the general proposition that the imposition of the mens rea requisite as a proper element of the offense removes any aspect of "strict liability" which might otherwise prevail (*e.g.*, did he have a duty to submit to induction? Did he do so?) The defendant's "cognizance" of the fact that he was picking up and remov-

ing property was not a sufficient attribute of the mens rea requirement to allow a conviction to stand. The defendant had to know more. As Justice Jackson indicates, he had to know that he was making a conversion. In the instant case, the prosecution must show that defendant knew that he had an absolute legal duty to submit to induction (and, as we argue elsewhere, we do not believe that his knowledge of that duty was so clear) and that by failing to submit to induction, the defendant thus knew he was violating the law and "knowingly refused".

II.

Elimination of Mistake as a Defense—Harris Problem.

The Court of Appeal for the Ninth Circuit, in deciding the instant appeal, stated:

> "Goodman also contends that the trial court erred when it refused to permit the physician, who was treating Goodman at the time of the trial, to corroborate Goodman's testimony that he honestly believed he was medically disqualified for induction and that the induction order was invalid. He also contends that the Court erred when it refused to allow the jury to see 32 C.F.R. §1628.2 (b). Both the Regulation and the doctor's testimony were properly excluded because 'good faith' would not excuse Goodman from his obligation to comply with the order to report for induction. United States v. More, ... F. 2d ...., No. 25,985 (9th Cir., January 13, 1971)."

The case of *United States v. More*, has a Petition for Writ of Certiorari pending to this Honorable Court, which was filed in the October Term, 1970. The *More* case cited *Harris v. United States*, 412 F. 2d 384 (9th

Cir., 1969) for the proposition that exclusion of evidence concerning good faith and refusing induction was not error. The defendant in *More,* as here, attempted to introduce evidence that the defendant honestly believed his particular induction order did not place upon him a duty to submit to induction and that, therefore, the defendant did not have the requisite specific intent (*viz:* "knowingly") required by statute.

As pointed out by the court, *United States v. Harris,* 412 F. 2d 394 (1969) is one of the leading cases in the Ninth Circuit on the question of specific intent. Harris holds that specific intent is a required element in a prosecution for violation of the Military Service Act of 1967.

It further defines specific intent as follows:

> "Where a person fails with bad purpose and with full knowledge of the possible consequences to do what the law required."

It further defines full knowledge as:

> "Refusing to do an act, knowing such refusal would be in violation of the laws of the United States."

It further defines bad purpose as:

> "Acting with the intent to violate the law."

In view of the foregoing holding that specific intent is an element of the crime, it would be logically impossible for Harris to stand for the proposition that evidence of lack of bad purpose should be excluded for this would allow evidence on only one side of an issue. Further, in *Harris,* the defendant did not raise either a mistake of fact or mistake of law defense as is raised in the instant case. He attempted, rather, to provide

the jury with his views relating to war and conscription and the fact that they were sincerely held. The Court upheld a refusal to allow such testimony on two grounds. First, the defendant cannot put the issue of legality of war or conscription directly before the jury because it is a question of law and for the Court to decide. Mr. Harris was not raising a good faith defense in the technical sense, he was merely asking the jury to find him not guilty on moral grounds alone, expecting the jurors to preempt the province of the Court on matters of law. Second, the defense of a "good faith belief in the unconstitutionality of a statute" could not be raised if the constitutionality of that statute had been upheld many times previously. In the instant case, of course, the defendant did not urge or request the jury to find C.F.R. §1628.2(b) or C.F.R. §1625 *et seq.* unconstitutional. On the contrary, he supported their validity and merely asked that the draft board comply with them. Thus, it is submitted this limited issue decided by Harris has no application to the instant case.

The *Harris* case also held evidence of good reputation to be inadmissible because appellant's credibility as a witness had not been attacked by the Government by any testimony that appellant's reputation for truth, honesty and veracity was bad, and, therefore, rehabilitation was unnecessary, an issue which has no application to this instant case.

But the Court in *Harris* did *not* refuse to admit evidence of surrounding circumstances on the issue of

specific intent. In fact, on page 389, the Court found the following to be a proper statement of the applicable law and the exact same language is now used in Federal Jury Practice and Instructions, §13,053:

> "Hence the motive of the defendant is immaterial except insofar as the evidence of motive may aid in determining the state of mind, his state of mind or intent."

A case on all fours with *Harris* was the *United States v. Boardman,* 410 F. 2d (1st Cir.). But neither Harris nor Boardman concerned a mistake defense. They merely restate the well settled rule that a good motive is not a defense to a criminal prosecution.

Other Circuits, however, have spoken on the question as to whether or not mistake is a valid defense to a Selective Service prosecution. Their holdings create a very clear conflict between the Circuits. In *United States v. Moylan,* 417 F. 2d 1009 (4th Cir.) the Court stated emphatically at page 1004, "other cases cited by appellants (in addition to *Morissette v. the United States*) likewise stand for the incontestible proposition that a mistaken belief as to a material fact, may negate a requisite mens rea".

Further, in the *United States v. Mancuso,* 139 F. 2d 90 (3rd Cir.) a mistaken belief of defendant as to the legal affect of civil litigation as affecting the validity of the induction order was held exculpatory. To the same effect, see also *United States v. Robb,* 394 F. 2d 230; *United States v. Kurila,* 401 F. 2d 448 (6th Cir.).

In the instant case, both the regulation and the doctor's testimony were offered on the issue of specific intent. The background facts of the regulation and the doctor's testimony were vital to the defense of whether or not the defendant honestly believed he was medically disqualified for induction and that the induction order was invalid, and thus, that the defendant did not possess a specific intent in that he neither intended to violate the law nor knew that his conduct would be in violation of the laws of the United States. The exclusion of such evidence, together with the misleading instruction, "there is no law which excuses failure to report for induction when ordered" (discussed *infra*) left the jury at a position where it was logically compelled to draw the following conclusions:

1. The defendant had no medical disabilities which disqualified him from service in the Armed Forces. (If he had, would he not have introduced medical testimony as to their existence?)

2. Even if the defendant did have a disqualifying medical condition, as a matter of law, the classification was correct. (And, therefore, the medical condition had no significance).

3. The Section of the Code of Federal Regulations which the defendant claimed he was relying upon as justification for his failure to report was not relevant to this case. (Or else the Judge would have allowed the jury to examine it).

4. There was no law which excused compliance with the induction order. (And therefore, the defendant must have been lying when he testified that his research had led him to the conclusion that he was not required to report.)

III.

Refusal to Allow Admission of the Defense Evidence.

A. It is respectfully submitted that the Court committed prejudicial error in refusing to allow any evidence in support of defendant's belief of the existence of the grounds for medical deferment except defendant's own statements. If defendant's own statements are admissible on the issue of specific intent as the trial court held, then surely, the defendant is entitled to introduce evidence which is corroborative of the truth and sincerity of his beliefs. Bizarre results would occur if the foregoing were not a correct statement of the law. For example, if a defendant, all other facts being equal, claimed he was entitled to a physical deferment by reason of a leg amputation, would it not be relevant and material to allow testimony as to whether, in fact, such a condition existed? If a jury were allowed to conjecture (without seeing the defendant) about the fact of amputation, it is entirely conceivable that a one-legged man could be convicted of draft evasion and sent to prison. The very fact that no jury would convict a man who was before them for three days of trial with only one leg also makes it seem obvious that if they could have been presented with evidence of the defendant's disability, they would likewise have not returned a verdict of guilty.

It is common knowledge that there are certain illnesses and medical defects which are recognizable only by trained medical experts. Recurrent Otitis Media in which the possibility of Cholesteatoma is suspected (an infectious process of the middle and inner ear) is certainly this type of illness. That this condition disqualifies a registrant for service in the armed forces has

been acknowledged and recognized by the Army, the elective Service System and the Congress of the United States, by the enactment of 32 C.F.R. 1628 and A.R. 40-501, §5, wherein the very disabilities suffered by this defendant are delineated as grounds for deferment from the armed forces. The trial court even took judicial notice of this fact during the court trial. How else then, other than by testimony from reputable medical experts, can a jury be expected to decide whether or not a defendant was sincere in his belief that he was suffering from a true medical ground for deferment. The existence of the medical disability, of course, goes to the question of specific intent for a claim of medical disability made by a defendant who knew or should have known that he had no such disability, could certainly be considered as evidence of bad purpose intent. If, in fact, the medical disability did not exist, it would be highly unlikely that a defendant could form a reasonable belief that it did exist. In this connection, it must be remembered that only testimony which the court permitted the jury to receive with regard to the existence of the medical disability was the testimony of defendant, which is inherently subject to suspicion as self-serving. It is submitted that as a practical matter, any reasonable juryman would be most skeptical of the existence of a medical disability if a physician were not produced to verify said condition. It is because of this elementary fact that, for example, there are few, if any, personal injury cases tried without expert medical testimony. The trial court erred in refusing to allow such evidence and this error was obviously prejudicial.

In reversing a conviction because of the failure of the trial court to allow the defendant to introduce evidence on the issue of specific intent regarding:

a. The fact that he had given up his job to prepare for induction, and

b. The existence of his mother's defective physical condition which prevented him from reporting for induction on the date scheduled, the Court in the United States v. Hoffman, 137 F. 2d 420 (2nd Cir. 1943) held that:

"In view of the importance of the issue as to the young man's state-of-mind, we think it clear that he was entitled to the same leeway given the government in proving the background facts, and that the restrictions thus placed upon his evidence, unfairly hampered his proof."

In *Haigler v. United States,* 172 F. 2d 986, and *Frank v. United States,* 220 F. 2d 559, it has also been held that it is prejudicial error to refuse to admit evidence of surrounding circumstances on the issue of specific intent.

B. The 1628.2(b) Regulation.

It has long been held that not every mistake will relieve criminal liability. The mistake doctrine contains an implied reasonableness modifier, *i.e.,* only reasonable mistakes of law are excused. In the instant case, the defense was that as a result of legal research, the defendant believed the induction order to be void, and thus, he was not required to report. The Court refused to allow the defendant to quote the language

of Section 1628.2(b) to the jury [R.T. p. 86]. In addition, both the prosecution's opening and closing arguments [R.T. pp. 204-211, 219-220] were almost exclusively devoted to the area of the defendant's research and knowledge of the law. It is thus submitted that the wording of §1628.2(b) was a crucial question of fact and the jury was entitled to consider this wording in order to assist them to determine whether the defendant acted reasonable or unreasonably with relation to his research. Can it be doubted that the jury would not have returned a conviction of guilty, had they the opportunity to consider the express mandatory wording of C.F.R. §1628.2(b) (*re* "whenever" . . . "shall")?

IV.

Failure to Give Proper Jury Instructions.

A. The Court erred in instructing the jury that as a matter of law, the Classification of defendant as 1-A was correct. This instruction was not only vague, ambiguous and misleading, but clearly prejudicial to a defendant in this type of case. The fallacy of such a statement is almost glaring. The case of the man with one leg is again a valid analogy (assuming, of course, that the amputation, for whatever reason, was not known by the draft board at the time of the 1-A Classification). The pure unarguable fact is that a person with only one leg is not 1-A. Likewise, a person with defendant's affliction was not 1-A because the law says such a person is not medically fit for service.

Code of Federal Regulation 1628.2(b), Army Regulation 40-501.

Therefore, as a matter of law, a person who suffers from the same affliction as defendant is not 1-A and, thus, the classification is, as a matter of law, incorrect. Thus, the instruction was erroneous.

B. The prosecution conceded that standing alone the instruction:

> "There is no law which excuses failure to report for induction when ordered."

is objectionable. However, the Government argued that the objection was cured merely by the addition of the language relating to specific intent. For this proposition, the Government cited the case of *Cohan v. United States*, 378 F. 2d 751 (9th Cir.). In the *Cohan* case, however, the Court held that it is only when the reviewing court is able to conclude, from the examination of the instructions as a whole, that a passage could not have misled the jury, that a conviction will be sustained. In view of the fact that, at the time of the erroneous instruction, the sole question in the jury's mind was whether defendant had a reasonable basis for his position due to his research, and thus, did not have specific intent, and in view of the fact that the jury returned *within seven minutes* with a verdict after the instruction was given, it is submitted that it could have had no other effect but to mislead the jury, for how could the defendant have formed a reasonable belief in the invalidity of the induction order from his research when the jury was told by the Court that no law existed which excused compliance with the induction order? While it is true that instructions must be

considered as a whole, it is also correct, as the United States Supreme Court instructed in *Bollenback v. United States,* 326 U.S. 604 at page 612:

> "In a criminal trial, the judges' last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

V.

Procedural Problems.

A. Motion for Acquittal.

The instant case creates a conflict among the Circuits relating to the doctrine of judgment of acquittal contained in Federal Rule 29A. When a Motion for Judgment of Acquittal is made at the close of the prosecution's case, the trial court cannot reserve a ruling.

Cephus v. United States, 324 F. 2d 893 (D.C.);
Jackson v. United States, 250 F. 2d 897 (5th);
Montoya v. United States, 402 F. 2d 847 (5th).

A Motion for Judgment of Acquittal is an important safeguard to the defendant for it avoids the risk that a jury may capriciously find him guilty even though there is no legally sufficient evidence of guilt.

United States v. Melillo, (DCNY) 275 F. Supp. 314; The Motion for Acquittal: A Neglected Safeguard, 70 Yale L.J. 1151.

A Motion for a Judgment of Acquittal at the close of the government's case implements the requirement that the prosecution must establish a *prima facie* case by its own evidence before the defendant shall be put to his defense.

The correct test for determining whether or not a Motion for Acquittal should be granted is as follows:

> "Whether reasonable minds could find that the evidence excludes every other hypothesis except that of guilt."
>
> *Kaplan v. United States,* 329 F. 2d 561 (9th Cir.).

It is urged that the error of the Court was two-fold. In the first place, the Motion for Acquittal at the close of the government's case should not have been reserved under the authorities hereinabove cited. Secondarily, the Motion for Acquittal should have been granted because, at the time of said motion, there was no evidence of specific intent. The opening statement of the government [Trans. pp. 32-34] contained no reference to the issue of intent. The government's case and its sole evidence consisted of pages 1, 2, 11, 12 and 80 of defendant's Selective Service file. Pages 1 and 2 were the registration card of the defendant. Pages 11 and 12 were the minutes of action by the local board. (It is interesting to note that these minutes contain no direct statement that defendant was ever even mailed a notice to report for induction on August 13, 1968). Page 80 purports to be a copy of the actual notice of introduction, however, it too contains no evidence that such a notice was ever mailed to defendant. The foregoing items were the sole evidence introduced by the government prior to their resting [Trans. p. 35].

On page 50, the following discussion took place:

> Mr. McCray: "That was why I was asking whether they had rested, because I would also like, at Your Honor's suggestion, to make a Motion for Acquittal."

The Court: "Alright. You make a Motion for Judgment of Acquittal and the Ruling on that will be reserved". [Trans. p. 50].

It is axiomatic that, in a criminal trial, the prosecution must prove every element of the crime beyond a reasonable doubt, including specific intent. It is submitted that at the time of the Motion for Judgment of Acquittal, there was not even a scintilla of evidence on the question of specific intent and, therefore, the motion for acquittal should have been granted.

It is further submitted that the motion for judgment of acquittal should have been granted at the end of the trial, irrespective of the reservation of ruling question, as a matter of law.

It is clear that under Harris even a mere desire not to be inducted would not constitute the element of specific intent. The Government contends, however, that the following evidence proves, beyond a reasonable doubt, the element of specific intent: (1) The conversation with the appeal agent, in which the statement was allegedly made that the defendant was not going into the service even if he had to marry a woman with a child (a valid legal basis for deferment at that time;) (2) obtaining student deferments while continuing his education; (3) requesting a continuance of a student deferment in March, 1968; and (4) requesting a 4-F Classification in August, 1968. The Government argues that we should consider these acts, which are admittedly legal and lawful, as evidence that defendant intended to act unlawfully with bad purpose. This being the "evidence" of specific intent, it seems clear that a reasonable mind could not find that the evidence excluded every other hypothesis ex-

cept that of guilt (Kaplan, *supra*) or that the defendant's guilt was proved beyond a reasonable doubt.

B. Shifting the burden of proof.

It appears that the practice of the Government in the Ninth Circuit has been to merely submit the Selective Service file and rest. There is grave doubt that this procedure establishes a *prima facie* case. The *United States v. Harris*, 412 F. 2d 384 (1969) holds that specific intent is a required element in the prosecution for violation of Military Service Act of 1967. It further defines specific intent as follows:

> "Where a person fails, with bad purpose and with full knowledge of the possible consequences, to do what the law required."

It further defines full knowledge as:

> "Refusing to do an act, knowing such refusal would be in violation of the laws of the United States."

It further defines bad purposes as:

> "Acting with intent to violate the law."

While it is true that specific intent may be inferred, it is inconceivable that the evidence necessary to establish "bad purpose" and "full knowledge", as defined above, can be inferred from a mere failure to report for induction. When a court permits such a procedure in cases such as this, where there was no evidence of bad purpose, intent in the registrant's file, it, in effect, shifts the burden of proof on the issue of specific intent, from the Government to the defendant. It is submitted that this is unconstitutional as violative of procedural due process.

The early history of the presumption of innocence is detailed in *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895), where the Court said:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

In *Morrison v. People of State of California*, 291 U.S. 82, 54 S. Ct. 281, 7 L. Ed. 664 (1934), the Court held:

> "In such circumstances, the conviction of Morrison, because he failed to assume the burden of disproving a conspiracy, was a denial of due process that vitates the judgment as to him." *Id.* at 93, 54 S. Ct. at 286.

In *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the Court said:

> "There is always, in litigation, a margin of error in factfinding, which both parties must take into account. Where one party has, at stake, an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party, the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder, at the conclusion of the trial, of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

And, Mr. Justice Douglas, in concurring, 357 U.S. at 525,—S. Ct. at 1345, pointed out:

> "If one conspires to overthrow the Government, he commits a crime. To make him swear he is innocent to avoid the consequences of a law is to put on him the burden of proving his innocence. That method does not square with our standards of procedural due process, as the opinion of the Court points out."

In *Deutch v. United States,* 367 U.S. 456, 471, 81 S. Ct. 1587, 6 L. Ed. 2d 963 (1961), the Court said:

> "In fulfillment of their obligation under this statute, the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases. [Watkins v. United States, 354 U.S. 178, 208, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957).] 'One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.' Irvin v. Dowd, 366 U.S. 717, 729, [81 S. Ct. 1639, 1646, 6 L. Ed. 2d 751] (concurring opinion). Among these is the presumption of the defendant's innocence. Sinclair v. United States, 279 U.S. [263], at 296-297, [49 S. Ct. 268, 73 L. Ed. 692]; Flaxer v. United States, 358 U.S. [147] at 151, [79 S. Ct. 191, 3 L. ed. 2d 183]."

In view of the foregoing, it is respectfully submitted that direction and guidance are needed by this Court to re-establish and set the ground rules for the specific intent element of Selective Service Law violation prose-

cutions before irremedial damage occurs below in the Circuit Courts. Such direction and guidance are also required by due process of law. *Kennedy v. Mendoza Martinez*, 372 U.S. 144.

For the foregoing reason, Petitioner prays a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit.

Dated: June 18, 1971.

THOMAS F. GOODMAN,
in Propria Persona,

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, vs. Thomas Fitch Goodman, Appellant. No. 25,484.

[March 16, 1971].

Appeal from the United States District Court for the Central District of California.

Before: BARNES and DUNIWAY, Circuit Judges, and SOLOMON*, District Judge.

SOLOMON, District Judge:

Thomas Fitch Goodman, a lawyer, appeals *in propria persona* from a jury trial conviction for his failure to report for induction in violation of 50 U.S.C. App. § 462. He contends that his local board denied him procedural due process by failing to give him a medical interview when he requested a IV-F classification after he received a notice of induction. He also contends that the trial court erred in its evidentiary rulings and jury instructions.

Goodman registered with his local board on August 5, 1960. He did not claim a disabling physical condition in the classification questionnaire (SSS Form 100) he mailed to the board in October, 1963. He passed an Army physical on September 26, 1966.

In early 1967, Goodman began to practice law in California. During 1967, Goodman was treated by Dr. Mark Maxwell for ear drainage, headaches, nausea,

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

and dizziness. The symptoms appeared periodically and lasted for two or three days.

On February 29, 1968, the California Appeal Board classified Goodman I-A. A short time later, the local board ordered Goodman to report for induction on March 6, 1968. On March 24, Goodman requested a student deferment on the ground that he had reentered college in January, 1968, as a full-time student to pursue a Bachelor of Arts degree in Business Administration. The board postponed his induction even though it knew Goodman was a practicing attorney.

On July 29, 1968, after the end of the school year, the board notified Goodman to report for induction on August 13, 1968, pursuant to the earlier order. Goodman did not receive the notice until August 7, 1968, because he did not notify the board that he had changed his address.

Immediately thereafter, Goodman visited Dr. Maxwell. On Friday, August 9, Goodman sent the board by regular mail a medical report and a request for a IV-F classification, claiming that he was suffering from one of the disqualifying conditions set out in Army Regulation 40-501. The board did not receive Goodman's request until Monday, August 12, one day before his scheduled induction.

The board did not respond to Goodman's request and Goodman did not report for induction. His indictment and conviction followed.

Goodman claims he was entitled to a medical interview pursuant to 32 C.F.R. § 1628.2(b)[1] even though

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[1]This section was revoked on August 26, 1970. It provided: "Whenever a registrant who is in class I-A, Class I-A-O, or Class I-O claims that he has one or more of the disqualifying

the board received his request for a IV-F classification one day before his scheduled induction and even though he did not specifically request a medical interview. He further contends that the board was required to postpone his induction order in order to consider his request and schedule a medical interview.

The purpose of a medical interview is to screen and disqualify those registrants who have obvious physical defects. 32 C.F.R. § 1628.1. The right to a medical interview at the registrant's request only exists before the registrant has had an Armed Forces physical examination. Operations Memorandum No. 327;[2] *United States v. Smith*, 423 F.2d 559 (9th Cir. 1970).

Goodman had already passed his Army physical examination on September 26, 1966. If his request for a IV-F had been timely, he would have been examined by the Armed Forces Examining and Entrance Station. But on the day before he was scheduled for induction,

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medical conditions or physical defects which appear in the list described in section 1628.1, the local board shall order him to present himself for an interview with the medical advisor to the local board by mailing to such registrant a Notice of Registrant to Appear for Medical Interview (SSS Form 219)."

[2]Operations Memorandum No. 327 was revoked on August 26, 1970. It provided:

"3. The claimed defect must be one that has not been previously presented and evaluated by the local board Medical Advisor or the Armed Forces Examining and Entrance Station. If the registrant has already had his physical examination, the papers submitted should be sent to the Examining Station for evaluation by the physicians there. If the registrant has not been examined, the procedures of section 1628.2(b) should be followed.

"4. In the event the claim is made after an induction order is issued, the evidence should be attached to the examination papers with a note directing the attention of the examining physician to the changed or new physical condition. If the examination papers have been mailed to the station, the registrant should be advised to take the evidence with him and present it to the examining physician at the time of induction."

the local board was not required to do anything other than to advise him of his right to present the claim at the induction physical examination. See Footnote 2. Since Goodman did not report, it did not do this.

Goodman contends that there was insufficient evidence of intent to support a conviction either at the end of the government's case or at the conclusion of all the evidence.

There was evidence that:

(1) Goodman passed an Army physical examination.

(2) He was classified I-A on September 11, 1967, and was notified of his classification.

(3) He appealed his classification and requested an interview with the appeals agent.

(4) On December 13, 1967, he told the appeals agent that he was practicing law, that he wanted to stay out of the service, and that he was not about to give up $25,000 a year to go into the service even if he had to marry someone with a child.

(5) The Appeal Board affirmed Goodman's I-A classification on February 29, 1968.

(6) He was ordered to report for induction on March 26, 1968.

(7) Two days before Goodman was to report, he requested a student deferment because he had re-entered college to obtain a Bachelor of Arts degree in Business Administration. His reporting date was postponed.

(8) At the end of the school year, he was again notified to report for induction on Tuesday, August 13, 1968, at 8:00 A.M. On the previous Friday (August

9, 1968), in a letter to the local board, sent by regular mail, he applied for a IV-F classification on physical grounds. He made no other attempt to get in touch with the local board.

(9) He knew he had the right to present his medical claims to the medical examiner at the Induction Center.

(10) He voluntarily and intentionally failed to report for induction.

We find that there was ample evidence, both in the Selective Service file and in the other evidence adduced at the trial, from which the jury could find intent to violate the provisions of the Selective Service law. *Harris v. United States*, 412 F.2d 384 (9th Cir. 1969).

Goodman also contends that the trial court erred when it refused to permit the physician who was treating Goodman at the time of the trial[3] to corroborate Goodman's testimony that he honestly believed he was medically disqualified for induction and that the induction order was invalid. He also contends that the court erred when it refused to allow the jury to see 32 C.F.R. § 1628.2(b). Both the regulation and the doctor's testimony were properly excluded because "good faith" would not excuse Goodman from his obligation to comply with the order to report for induction. *United States v. More*, ...F.2d ....., No. 25,985 (9th Cir. January 13, 1971); *United States v. Shunk*, ... F.2d ...., No. 26,241 (9th Cir. February 19, 1971). The regulation and the doctor's testimony were also irrelevant on the issue of whether Goodman had the requisite intent to violate the law. *Harris v. United States, supra.*

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[3]The physician who treated Goodman when he refused induction died before the trial.

Goodman also contends that the trial judge erred when he instructed the jury, "There is no law which excuses the failure to report for induction when ordered . . . ."[4] This instruction was taken out of context. Instructions must be considered as a whole. When so considered, the instructions which the trial court gave are neither misleading nor prejudicial; in fact, they are more favorable to Goodman than that to which he was entitled under *Harris v. United States, supra.*

Goodman asserts that the Court erred in several other respects, some of which were not objected to at the trial. We find that each of such claimed errors has no merit and does not justify discussion.

AFFIRMED.

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[4]When the jury returned for further instructions on the regulations, the Court stated: "This regulation to which I have made reference is an Army regulation. I took judicial notice of it. It had to do with the question of illnesses. It does not have to do with the question of—it does not destroy the validity of the order to report. But in this case the Government must not only prove beyond a reasonable doubt that the defendant failed to report, but it must also prove that the defendant knowingly failed to report as required by the law, intending with bad purpose either to disobey or disregard the law."

The judy foreman asked, "What is the law or regulations whereby a man may legally not report for induction as ordered?"

The Court instructed,

> "There is a procedure, which was mentioned by the defendant in his letter dated August 9, 1968, to the local board, whereby a person may request a reclassification by the local board; but if the board does not grant the reclassification the order to report remains in legal effect.
>
> "There is no law which excuses failure to report for inducfion when ordered, when it is ordered; but before you can convict the defendant of the crime charged the Government—it must be established, it must be established beyond a reasonable doubt, that the defendant intended with bad purpose to either disobey or to disregard the law in failing to report."